

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 02 April 2004

CASE NO.: 2001-BLA-329

In the Matter of:

EMMETT R. LAMBERT,
Claimant

v.

HONEYWELL INTERNATIONAL, INC.,
Employer

and

ALLIED-SIG,
Carrier

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest

BEFORE: Robert J. Lesnick
Administrative Law Judge

DECISION AND ORDER ON REMAND - DENIAL OF BENEFITS

This proceeding arises from a subsequent claim filed by Emmett R. Lambert for benefits under the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901, *et seq.*, as amended ("Act"). Benefits under the Act are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of persons who were totally disabled at the time of their death or whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising out of coal mine employment, and is commonly known as black lung.

Each of the parties has been afforded full opportunity to present evidence and argument as provided in the Act and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

The findings and conclusions that follow are based upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law.

ISSUES¹

- 1.) Whether the Miner has pneumoconiosis as defined by the Act and the regulations;
- 2.) Whether the Miner's pneumoconiosis arose out of coal mine employment;
- 3.) Whether the Miner is totally disabled;
- 4.) Whether the Miner's disability is due to pneumoconiosis; and,
- 5.) Whether the evidence establishes a change in conditions and/or that a mistake was made in the determination of any fact in the prior denial per 20 CFR 725.310.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History and Factual Background

The Claimant, Emmett R. Lambert, filed a claim for black lung benefits pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, on May 7, 1979 (DX 53).² The claim was denied by Administrative Law Judge Daniel A. Sarno, Jr. on June 18, 1986 (DX 53). The Board affirmed this denial on June 30, 1988. The Claimant filed a subsequent claim for benefits on November 9, 1993. Administrative Law Judge Edward Terhune Miller denied this claim on March 6, 1996 (DX 54). The Board affirmed this denial on March 20, 1997 and denied the Claimant's motion for reconsideration on May 29, 1997 (DX 54).

The Claimant filed another application for benefits on June 1, 1998 (DX 1). After holding an informal conference, the District Director denied the claim on July 18, 1999 (DX 37). The Claimant requested modification on May 1, 2000 (DX 44). The District Director denied the modification request on September 22, 2000 (DX 49), and the claim was referred to the Office of Administrative Law Judges on December 27, 2000 (DX 56). A hearing was scheduled for February 28, 2002, which the Claimant failed to attend. The undersigned issued an Order to show cause why the claim should not be dismissed for the Claimant's failure to attend the hearing. The Claimant failed to adequately respond to this Order. Consequently, the undersigned dismissed the claim on April 9, 2002. The Claimant appealed. On March 28, 2003, the Board issued a Decision and Order remanding the claim to the undersigned to determine whether the Claimant established good cause through a March 22, 2002 letter of which the undersigned was previously unaware. On August 20, 2003, the undersigned issued an Order to

¹ In its closing brief, the Employer stated that it had withdrawn its contest to all of the issues except these 5.

² In this Decision, "DX" refers to the Director's Exhibits and "EX" refers to the Employer's Exhibit.

show cause why the claim should not be decided on the record. On September 17, 2003, I issued an Order that the claim would be decided on the record.

Modification

The Claimant filed his second claim for black lung benefits on November 9, 1993 (DX 54). Because this claim was filed after March 31, 1980, the effective date of Part 718, it must be adjudicated under those regulations.³ Since the Claimant requested modification within one year of the District Director's July 18, 1999 denial of benefits, I will "consider whether any additional evidence submitted by the parties demonstrates a change in condition and, regardless of whether the parties have submitted new evidence, whether the evidence of record demonstrates a mistake in a determination of fact." 20 C.F.R. § 725.310(c).

In determining whether a "change in conditions" is established, I will conduct an independent assessment of the newly submitted evidence (all evidence submitted subsequent to the prior denial) and consider it in conjunction with the previously submitted evidence to determine if the weight of the evidence is sufficient to demonstrate an element or elements of entitlement that were previously adjudicated against claimant. *Kingery v. Hunt Branch Coal Co.*, 19 B.L.R. 1-6 (1994) ("change in conditions" not established where the existence of pneumoconiosis by chest x-ray demonstrated in the original claim and claimant merely submitted additional positive x-ray readings on modification).

Medical Evidence

Chest X-rays

	<u>Date</u>	<u>Exhibit</u>	<u>Physician/ Qualifications</u>	<u>Reading</u>	<u>Standards</u>
1.	08/10/98	DX 16	Cole B reader Board cert.	1/2 t, r	Fair
2.	08/10/98	DX 17, 18	Patel B reader Board cert.	2/2 s,s	Good
3.	10/09/97	DX 54	Deardorff B reader Board cert.	3/3	Not noted
4.	11/15/94	DX 54	Spitz B reader	No pneumo.	Fair

³ Amendments to the Part 718 regulations became effective on January 19, 2001. Section 718.2 provides that the provisions of § 718 shall, to the extent appropriate, be construed together in the adjudication of all claims.

	<u>Date</u>	<u>Exhibit</u>	<u>Physician/ Qualifications</u>	<u>Reading</u>	<u>Standards</u>
			Board cert.		
5.	11/15/94	DX 54	Shipley B reader	1/1 s,t; no pneumo.	Poor
			Board cert.		
6.	11/15/94	DX 54	Wiot B reader	No pneumo.	Fair
			Board cert.		
7.	11/15/94	DX 54	Hippensteel B reader	1/2 s,s	Not noted
8.	04/08/94	DX 54	Smith B reader	2/1 q,t	Good
			Board cert.		
9.	12/10/93	DX 54	Illegible	1/0 t,s	Good
10.	12/09/93	DX 54	Sargent B reader	0/1 s,t	Good
			Board cert.		
11.	12/09/93	DX 54	Francke B reader	No pneumo.	Good
			Board cert.		
12.	12/09/93	DX 54	Hayes B reader	0/1 t,s ⁴	Not noted
			Board cert.		
13.	11/08/93	DX 54	Dwyer Board cert.	COPD and interstitial fibrosis	Not noted
14.	12/19/91	DX 54	Valiveti	Chronic interstitial changes	Not noted
15.	11/27/91	DX 54	Valiveti	Chronic interstitial changes	Not noted
16.	02/19/91	DX 54	Valiveti	Chronic changes	Not noted
17.	01/29/91	DX 54	Valiveti	Right basal infiltrate	Not noted
18.	11/14/89	DX 54	Spitz B reader	No pneumo.	Fair
			Board cert.		
19.	11/14/89	DX 54	Shipley	1/0 s,t; no pneumo.	Poor

⁴ Originally, Dr. Francke read this x-ray as 1/0 (DX 54). He changed this reading to 0/1 in a February 15, 1994 letter (DX 54).

	<u>Date</u>	<u>Exhibit</u>	<u>Physician/ Qualifications</u>	<u>Reading</u>	<u>Standards</u>
			B reader Board cert.		
20.	11/14/89	DX 54	Wiot B reader Board cert.	No pneumo.	Poor
21.	11/14/89	DX 54	Gaziano B reader	1/1	Not noted
22.	12/29/88	DX 54	Sparks B reader Board cert.	Chronic appearing lung disease	Not noted
23.	12/27/88	DX 54	Duncan B reader Board cert.	Emphysema with mild interstitial fibrosis	Not noted
24.	10/11/85	DX 54	Hayes B reader Board cert.	Increase interstitial markings	Not noted
25.	01/03/84	DX 54	Felson B reader Board cert.	0/0	Fair
26.	01/03/84	DX 54	Wiot B reader Board cert.	---	Unreadable
27.	01/03/84	DX 54	Bassali B reader Board cert.	2/2 p,s	Good
28.	12/27/83	DX 53	Felson B reader Board cert.	Completely negative	Good
29.	09/25/83	DX 54	Francke B reader Board cert.	Flattening of diaphragm	Not noted
30.	04/20/83	DX 53	Wiot B reader Board cert.	0/0	Fair
31.	04/20/83	DX 53	Felson B reader	Completely negative	Good

	<u>Date</u>	<u>Exhibit</u>	<u>Physician/ Qualifications</u>	<u>Reading</u>	<u>Standards</u>
			Board cert.		
32.	04/20/83	DX 53	Lapp B reader	No pneumo.	Good
33.	04/20/83	DX 53	Renn B reader	Completely negative	Good
34.	04/20/83	DX 53	Bassali B reader Board cert.	2/3 p,s	Good
35.	03/24/83	DX 53	Zaldivar B reader	---	Unreadable
36.	03/24/83	DX 53	Lapp B reader	---	Unreadable
37.	03/24/83	DX 53	Renn B reader	Completely negative	Fair
38.	03/24/83	DX 53	Gaziano B reader	---	Unreadable
39.	03/24/83	DX 53	Navarro	1/1 p	Not noted
40.	01/28/82	DX 53	McKay Board cert.	Completely negative	Fair
41.	07/01/81	DX 53	Renn B reader	Completely negative	Fair
42.	07/01/81	DX 53	Gaziano B reader	0/1 s	Fair
43.	07/01/81	DX 54	Francke B reader Board cert.	0/0	Good
44.	05/12/81	DX 53	Wiot B reader Board cert.	0/0	Fair
45.	05/12/81	DX 53	Bassali B reader Board cert.	3/3 p,s	Fair
46.	05/12/81	DX 53	Morgan B reader	Completely negative	Good
47.	05/12/81	DX 53	Renn B reader	Completely negative	Fair

	<u>Date</u>	<u>Exhibit</u>	<u>Physician/ Qualifications</u>	<u>Reading</u>	<u>Standards</u>
48.	05/12/81	DX 54	Tanguilig Board cert.	Nonspecific interstitial fibrosis	Not noted
49.	10/08/80	DX 54	Bassali B reader Board cert.	2/1 p,s	Good
50.	10/08/80	DX 53	Morgan B reader	Completely negative	Fair
51.	10/08/80	DX 53	Renn B reader	Completely negative	Fair
52.	10/08/80	DX 53	Francke B reader Board cert.	Completely negative	Good
53.	04/03/80	DX 53, 54	Altman B reader Board cert.	0/1 s	Fair
54.	03/13/80	DX 53	Morgan B reader	Completely negative	Good
55.	03/13/80	DX 53	Renn B reader	Completely negative	Fair
56.	03/13/80	DX 54	Francke B reader Board cert.	Completely negative	Fair
57.	03/13/80	DX 53	Gaziano	1/1 q	Fair
58.	04/11/79	DX 53	Zaldivar B reader	Completely negative	Fair
59.	04/11/79	DX 53	Lapp B reader	No pneumo.	Good
60.	04/11/79	DX 53	Renn B reader	Completely negative	Fair
61.	04/11/79	DX 54	Navarro	1/1 p,s	Not noted

Pulmonary Function Studies⁵

	<u>Date</u>	<u>Exhibit</u>	<u>Doctor</u>	<u>Age/ Height</u>	<u>FEV₁</u>	<u>FVC</u>	<u>MVV</u>	<u>FEV₁/ FVC</u>	<u>Standards</u>
1.	09/09/00 ⁶	DX 52	Illegible Post-bronchodilator	82/71"	1.78 1.85	2.72 2.91	--- ---	65% 64%	Poor test quality
2.	08/10/98	DX 12	Rasmussen Post-bronchodilator	80/67"	2.03 2.18	3.99 4.08	67 --	51% 53%	Good comp. & coop.
3.	11/15/94	DX 54	Hippensteel	76/68"	1.06	1.09	--	97%	Coughing
4.	10/07/94	DX 54	Peterson	76/70"	2.38	3.42	61	70%	Difficulty
5.	12/10/93	DX 54	Walker	75/68"	2.08	3.73	--	56%	Good comp. & coop.
6.	04/20/83	DX 54	Rasmussen	65/70"	2.39	2.75	--	87%	Syncopal episode
7.	03/13/80	DX 53	Gaziano	61/69.5"	2.732	4.072	112.05	67%	

Arterial Blood Gas Tests

	<u>Date</u>	<u>Exhibit</u>	<u>pCO₂</u>	<u>pO₂</u>
1.	08/10/98	DX 15	34.0	75
2.	11/15/94	DX 54	32.7	77
3.	05/90	DX 54	25	71
4.	07/11/85	DX 53	26.4	69.2
5.	04/20/83	DX 54	30	71
			30	62
			30	64
6.	11/10/81	DX 53	37	84
7.	05/19/81	DX 53	27	88
8.	03/13/80	DX 53	29	77
		(Exercise)	30	89

⁵ A “qualifying” pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A “non-qualifying” study exceeds those values. See 20 C.F.R. § 718.204(c)(1)-(2).

⁶ The record contains a July 25, 2001 letter from Greg McLaughlin, MS that lists a number of deficiencies with this pulmonary function study (EX 1).

Physician Reports

Dr. D.L. Rasmussen

Dr. D.L. Rasmussen examined the Claimant on August 10, 1998 (DX 14). He noted the Claimant's family, medical, employment, and smoking histories. Dr. Rasmussen administered a pulmonary function study (minimal irreversible obstructive ventilatory impairment) and arterial blood gas study (normal) and interpreted an x-ray (2/2 s,s). He diagnosed (1) asbestosis due to asbestos exposure; (2) COPD due to occupational dust exposure; and (3) ASHD due to nonoccupational reasons. Dr. Rasmussen opined that the Claimant did not retain the pulmonary capacity to perform his last coal mining job. He concluded that "[w]hile the patient's coal mine dust exposure may have contributed to his impaired function, his exposure to asbestos is the most likely cause of his impaired function." At his subsequent deposition (DX 32), Dr. Rasmussen agreed that there was insufficient evidence to make a definitive diagnosis of coal workers' pneumoconiosis. He believed that the evidence was more consistent with the presence of asbestosis. Dr. Rasmussen concluded that the Claimant was totally disabled from a pulmonary standpoint due to his asbestos-related disease.

The record contains two July 22, 1983 letters from Dr. Rasmussen (DX 54). Dr. Rasmussen stated that the degree of variation in the blood gas study values is in no way unusual and the blood gas abnormalities are consistent with coal workers' pneumoconiosis, which is totally disabling for the Claimant's coal mine employment.

Dr. Rasmussen previously examined the Claimant on April 20, 1983 (DX 54). He noted that the ventilatory studies were unsatisfactory.

Dr. Kirk Hippensteel

Dr. Kirk Hippensteel examined the Claimant on November 15, 1994 (DX 54). He opined that the Claimant did not suffer from coal workers' pneumoconiosis. Dr. Hippensteel concluded that the Claimant could not work, but the reason for this inability to work was unrelated to the Claimant's prior coal mine employment.

Dr. James H. Walker

Dr. James H. Walker examined the Claimant on December 10, 1993 (DX 54). He noted the Claimant's work, family, and medical histories, as well as the Claimant's symptoms. His examination of the Claimant was essentially normal. He diagnosed coal workers' pneumoconiosis and bronchitis and attributed these conditions to coal dust exposure. Dr. Walker opined that the Claimant could do his last coal mine employment.

Dr. Sven Jonsson

The record contains a July 16, 1993 letter from Dr. Sven Jonsson at Cabin Creek Health Center (DX 54). Dr. Jonsson stated that the Claimant has multiple problems, including diabetes, coronary artery disease, peripheral vascular disease, hypothyroid, and black lung.

Dr. L.S. Agrawal

The record contains a March 19, 1992 letter from Dr. L.S. Agrawal (DX 54). He stated that the Claimant's cough syncope is not work related.

Dr. Colin Craythorne

The record contains a January 24, 1992 letter from Dr. Colin Craythorne (DX 54). He opined that the Claimant cannot return to any type of renumorative employment.

Dr. D. Gaziano

The record contains a June 3, 1990 medical report from Dr. D. Gaziano (DX 54). He noted that the Claimant suffers from pneumonia, post tussive syncope, history of COPD, mild diabetes mellitus, and history of hypertensive cardiovascular disease.

The record contains a November 20, 1989 letter from Dr. Gaziano (DX 54). He stated that an x-ray showed pneumoconiosis 1/1 and that a specific and clear-cut etiology could not be established for the Claimant's cough syncope.

Dr. Gaziano examined the Claimant on March 13, 1980 (DX 53). He noted the Claimant's employment, family, and medical histories. Dr. Gaziano diagnosed coal workers' pneumoconiosis and attributed it to the Claimant's coal mine employment.

Dr. Robert Crisalli

Dr. Robert J. Crisalli examined the Claimant on January 28, 1982 (DX 53). He stated that the medical evidence was insufficient to diagnose coal workers' pneumoconiosis. However, Dr. Crisalli did diagnose bronchitis, seizure disorder, diabetes, hypertension, and hiatal hernia.

Treatment Notes and Physician Reports

The record contains notes written on a pulmonary function study report by a doctor whose signature is illegible (DX 49, 52). The physician stated that "Emmett Lambert is my patient. I have been treating him for black lung and COPD. He continues to suffer from shortness of breath and has a nodule on chest x-ray that we are in the process of evaluating. See report. Due to the extent of his pulmonary insufficiency, he is 100% disabled."

The record contains a December 1997 Discharge Summary and History & Physical at the Thomas Memorial Hospital (DX 13). Dr. E. Figueroa diagnosed COPD with acute exacerbation.

The record contains treatment notes from the Cabin Creek Health Association, Inc. and West Virginia University Hospital covering visits by the Claimant in 1981 (DX 53). These notes state that the Claimant suffered from syncopal episodes following cough and COPD with probable antecedents being coal dust, asbestos, and cigarettes.

The record contains an April 12, 1979 Physician's Report of Occupational Pneumoconiosis that was used by the Claimant in securing benefits from the West Virginia Workmen's Compensation Fund (DX 53).

Conclusions of Law

In order to establish entitlement to benefits, the Claimant must establish that the Miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. See 20 C.F.R. §§ 718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 B.L.R. 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986) (*en banc*).

Existence of Pneumoconiosis

Section 718.202(a)(1-4) provides four methods for finding the existence of pneumoconiosis: (a)(1) chest roentgenogram (x-ray) evidence; (a)(2) autopsy or biopsy; (a)(3) by operation of presumption; or (a)(4) by other relevant evidence (medical opinions).

A judge is not required to defer to the numerical superiority of x-ray evidence. *Wilt v. Wolverine Mining Co.*, 14 B.L.R. 1-70 (1990). Where two or more x-ray reports are in conflict, the radiological qualifications of the physicians interpreting the x-rays should be considered. *Aimone v. Morrison Knudson Co.*, 8 B.L.R. 1-32 (1985). Greater weight may be accorded the x-ray interpretation of a dually-qualified (B-reader and board certified) physician over that of a board certified radiologist. *Herald v. Director, OWCP*, BRB no. 94-2354 BLA (Mar. 23, 1995) (unpublished).

The record contains 61 interpretations of 26 x-rays. Sixteen of these interpretations are positive for the presence of pneumoconiosis. I note, however, that Dr. Shipley made two positive readings (November 14, 1989 x-ray interpreted by Dr. Shipley and November 15, 1994 interpretation by Dr. Shipley) but then stated that the x-ray did not show pneumoconiosis. Consequently, I give those two interpretations less weight. The preponderance of the x-ray evidence is negative for the presence of pneumoconiosis. Indeed, of the 32 interpretations made by dually qualified physicians, only ten were positive, two of which were the interpretations by Drs. Shipley that are entitled to less weight. I find that the Claimant has failed to establish pneumoconiosis through a preponderance of x-ray evidence.

The second method of establishing coal workers' pneumoconiosis, Section 718.202(a)(2), is inapplicable herein because there are no biopsy results. The third way of establishing coal

workers' pneumoconiosis is through various presumptions. Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found applicable. In the case at hand, the presumption of Section 718.304 does not apply as there is no evidence in the record of complicated pneumoconiosis. Section 718.305 is also inapplicable as it only applies to claims filed before January 1, 1982. Lastly, the presumption of Section 718.306 does not apply to living miner's claims. Therefore, the Claimant cannot establish pneumoconiosis under Section 718.202(a)(3).

The fourth method available to the Claimant in establishing that he suffers from pneumoconiosis is by well-reasoned, well-documented medical opinions from physicians establishing that the Claimant suffers from a respiratory or pulmonary impairment arising out of coal mine employment. Under Section 718.202(a)(4), a determination of the existence of pneumoconiosis may be made if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in Section 718.201. Pneumoconiosis is defined in Section 718.201 as chronic dust disease of the lung, including respiratory or pulmonary impairments arising out of coal mine employment. This definition includes both "Clinical Pneumoconiosis" and "Legal Pneumoconiosis."

For a physician's opinion to be accorded probative value, it must be well-reasoned and based upon objective medical evidence. An opinion is reasoned if it contains underlying documentation adequate to support the physician's conclusions. *See Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which the diagnosis is based. *Id.* A brief and conclusory medical report which lacks supporting evidence may be discredited. *See Lucostic v. United States Steel Corp.*, 8 B.L.R. 1-46 (1985). A report may be given little weight where it is internally inconsistent and inadequately reasoned. *Mabe v. Bishop Coal Co.*, 9 B.L.R. 1-67 (1986). It is proper to accord little probative value to a physician's opinion that is inconsistent with his or her earlier report or testimony. *Hopton v. U.S. Steel Corp.*, 7 B.L.R. 1-12 (1984).

Further, a medical report may be rejected as unreasoned where the physician fails to explain how his findings support his diagnosis. *See Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985). Finally, a nonexamining physician's opinion may constitute substantial evidence if it is corroborated by the opinion of an examining physician or by the evidence considered as a whole. *Newland v. Consolidation Coal Co.*, 6 B.L.R. 1-1286 (1984).

The medical opinion evidence of record does not support a finding of pneumoconiosis. Dr. Rasmussen originally diagnosed coal workers' pneumoconiosis. At his subsequent deposition, however, Dr. Rasmussen conceded that there was insufficient evidence to make a definitive diagnosis of coal workers' pneumoconiosis. Instead, he opined that the evidence was more consistent with the presence of asbestosis. Consequently, Dr. Rasmussen's opinion is insufficient to support a finding of pneumoconiosis. Dr. Kirk Hippensteel opined that the Claimant does not suffer from pneumoconiosis. Further, Dr. Crisalli stated that the medical evidence was insufficient to diagnose coal workers' pneumoconiosis. I find that the opinions of Drs. Hippensteel and Crisalli do not support a finding of pneumoconiosis.

The record contains handwritten notes purportedly by a physician on a sheet of paper that is reporting pulmonary function study results from the September 9, 2000 pulmonary function study (DX 52). Although the physician notes that he or she has been treating the Claimant for black lung and COPD, the physician fails to explain the bases for his or her belief that the Claimant suffers from black or COPD. Without any reasonable explanation or support, this conclusory opinion is insufficient to outweigh the contrary evidence of record.

Drs. James H. Walker, Sven Jonsson, and D. Gaziano specifically diagnosed black lung or pneumoconiosis. However, these opinions are insufficient to establish through a preponderance of the evidence that the Claimant suffers from pneumoconiosis. Dr. Walker failed to account for potential alternative causes of the Claimant's condition, including asbestosis. Medical records from the Claimant's 1981 visits to treatment centers reveals that the Claimant worked up to 12 years in a power plant where he had asbestos exposure. Dr. Jonsson diagnosed black lung but failed to explain the bases for his opinion, or identify medical records or tests that supported such a diagnosis. Dr. Gaziano diagnosed the Claimant with coal workers' pneumoconiosis in 1980. Like Dr. Walker, Dr. Gaziano failed to consider potential alternative causes of the Claimant's respiratory problems.

Based on a review of all of the medical opinions of record, I find that the Claimant has failed to prove by a preponderance of the medical opinion evidence that he suffers from pneumoconiosis. Rather, the opinions contrary to a finding of pneumoconiosis are entitled to at least as much weight, if not more, than the opinions that diagnosed pneumoconiosis. Moreover, considering the x-ray evidence along with the medical opinion evidence, I find that the weight of the evidence is contrary to a finding of pneumoconiosis. Consequently, the Claimant's request for benefits must be denied. *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986) (*en banc*).

Arising Out of Coal Mine Employment

Assuming *arguendo* that the Claimant had established the presence of pneumoconiosis, he would be entitled to a presumption that his pneumoconiosis arose out of his coal mine employment. However, I find that the evidence of record would rebut this presumption. As explained by Dr. Rasmussen, the more reasonable and logical view of the evidence is that the Claimant's respiratory difficulties are more consistent with a finding of asbestosis than pneumoconiosis. Consequently, even if the Claimant had proven the existence of pneumoconiosis, I would find that his claim must fail because the evidence of record does not support a finding that his respiratory problems are due to his coal mine employment.

Total Disability

Assuming *arguendo* that the Claimant had proven the first two elements of entitlement, I find that the Claimant failed to establish by a preponderance of the evidence that he is totally disabled. Total disability is defined as pneumoconiosis that prevents or prevented a miner from performing his usual coal mine employment or other gainful work. 20 C.F.R. §§ 718.305(c), 718.204(b)(2). Total disability may be established by pulmonary function testing. 20 C.F.R. § 718.204(b)(2)(i). Little or no weight may be accorded to a pulmonary function study in which the miner exhibited poor cooperation or comprehension. *Houchin v. Old Ben Coal Co.*, 6 B.L.R.

1-1141 (1984). However, if fair effort is noted on the study, the study may be conforming. *Laird v. Freeman United Coal Co.*, 6 B.L.R. 1-883 (1984).

Only one of the pulmonary function studies (November 15, 1994) and three of the arterial blood gas studies produced results that qualify as showing total disability. The most recent pulmonary function study produced results that fail to qualify as showing total disability under the regulations. Moreover, the Claimant's performance on some of the pulmonary function studies has been called into question because of coughing or syncopal episodes. Consequently, I find that the Claimant has failed to establish total disability through the submission of pulmonary function and arterial blood gas study evidence.

Dr. Walker opined that the Claimant could perform his last coal mine employment. His opinion on this issue is supported by the objective medical evidence. Dr. Craythorne opined that the Claimant cannot return to any type of renumeration employment. I find that this opinion is not supported by the objective medical evidence of record and is poorly explained. He does not provide any medical support for his opinion and fails to explain the basis for his opinion. Dr. Hippensteel concluded that the Claimant could not work. He stated that the reason for this inability to work was unrelated to the Claimant's prior coal mine employment. I find that Dr. Hippensteel failed to explain the basis for his opinion on the issue of total disability. Consequently, I entitle his opinion on this issue to little weight. Also, the Claimant cannot establish total disability through the handwritten notes of an unidentified physician (DX 49, 52). The unidentified physician failed to provide support for his or her opinion and the page on which the notes are written contain pulmonary function study results that are contrary to the opinion of total disability. Finally, the Claimant cannot rely on the opinion of Dr. Rasmussen to establish total disability because Dr. Rasmussen failed to adequately explain why he believed that the Claimant was total disabled, especially in light of the fact that the pulmonary function study performed by Dr. Rasmussen failed to produce qualifying results.

The Claimant has failed to establish total disability through a preponderance of medical opinion evidence. Weighing the medical opinion evidence with the pulmonary function study and arterial blood gas study evidence of record, I find that the Claimant has failed to establish total disability through a preponderance of the evidence. Consequently, the Claimant is not entitled to benefits.

Etiology of Total Disability

Assuming *arguendo* that the Claimant had established the first 3 elements of entitlement, he must establish that his total disability is due to pneumoconiosis. Prior to the 2000 Amendments, in order to recover under the Act, a claimant had to prove that pneumoconiosis was a "contributing cause" to the miner's disability. *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990). In *Milburn Colliery Co. v. Director, OWCP [Hicks]*, 138 F.3d 524 (4th Cir. 1998), the court held that even if it is determined that Claimant suffers from a totally disabling respiratory condition, he "will not be eligible for benefits if he would have been totally disabled to the same degree because of his other health problems."

The amended regulations at § 718.204(c) contain the following standard for determining whether total disability is caused by the miner's pneumoconiosis:

(c)(1) Total disability due to pneumoconiosis defined. A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in Sec. 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a 'substantially contributing cause' of the miner's disability if it: (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. (2) Except as provided in Sec. 718.305 and paragraph (b)(2)(iii) of this section, proof that the miner suffers or suffered from a totally disabling respiratory or pulmonary impairment as defined in paragraphs (b)(2)(i), (b)(2)(ii), (b)(2)(iv) and (d) of this section shall not, by itself, be sufficient to establish that the miner's impairment is or was due to pneumoconiosis. Except as provided in paragraph (d), the cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report.

20 C.F.R. § 718.204(c) (Dec. 20, 2000).⁷

Based on a review of the evidence of record, I find that the Claimant has failed to establish that his total disability was due to his coal mine employment. As I explained above, at best the evidence establishes that any respiratory or pulmonary impairment suffered by the Claimant was more likely caused by his exposure to asbestos rather than his exposure to coal dust. Consequently, the Claimant has failed to establish through a preponderance of the evidence that his total disability is due to his pneumoconiosis and his claim must fail.

Entitlement

Upon consideration of all of the evidence of record, I find that the Claimant, Emmett R. Lambert, has failed to meet his burden of proof on all elements of entitlement under the Act, and therefore, is not eligible for benefits.

⁷ In its comments, the Department noted that addition of the word "material" or "materially" to the foregoing provisions reflects the view that "evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause to that disability." Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,946 (Dec. 20, 2000).

Attorney's Fees

The award of an attorney's fee under the Act is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services rendered to him in pursuit of this claim.

ORDER

It is hereby ordered that the claim of Emmett R. Lambert for benefits under the Act is hereby DENIED.

A

ROBERT J. LESNICK
Administrative Law Judge

RJL/DB/dmr

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the **Benefits Review Board at P.O. Box 37601, Washington, D.C., 20012-7601**. A copy of a Notice of Appeal must also be served upon Donald S. Shire, Esq., 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C., 20210.